

1 **COUNSEL IDENTIFICATION ON FINAL PAGE**

2 **UNITED STATES DISTRICT COURT**
3 **EASTERN DISTRICT OF CALIFORNIA**
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8 **THE CONSOLIDATED DELTA SMELT**
9 **CASES**

Lead Case:
1:09-cv-407-LJO-BAM

Member Cases:
1:09-cv-422-LJO-DLB
1:09-cv-631-LJO-DLB
1:09-cv-892-LJO-GSA

Partially Consolidated With:
1:09-cv-480-LJO-GSA
1:09-cv-1201-LJO-DLB

**RESPONSE RE REQUEST TO
EXTEND REMAND SCHEDULE**

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16 **THE CONSOLIDATED SALMONID**
17 **CASES**

Lead Case:
1:09-cv-1053-LJO- BAM

Member Cases:
1:09-cv-1090-LJO-DLB
1:09-cv-1378-LJO-DLB
1:09-cv-1520-LJO-DLB
1:09-cv-1580-LJO-DLB
1:09-cv-1625-LJO-SMS

**RESPONSE RE REQUEST TO
EXTEND REMAND SCHEDULE**

1 Federal Defendants and Plaintiff-Intervenor California Department of Water Resources
2 (DWR) (collectively Movants) hereby respond to: (1) the proposed six-month extension of the
3 remands, with a status report due shortly before expiration of the extension; and (2) the
4 statements of Metropolitan Water District of Southern California and State Water Contractors
5 (State Contractors), Kern County Water Agency (Kern), the Coalition for a Sustainable Delta
6 (Coalition), and the Defendant Intervenors. Order Permitting Response Re Request to Extend
7 Remand Schedule at 2 (Order), Smelt Doc. No. 1114; Salmonid Doc. No. 750. Movants address
8 each in turn below; at bottom, however, we oppose a six-month extension and imposition of any
9 additional requirements onto the Collaborative Science Adaptive Management Program
10 (CSAMP) and/or the Court-ordered remands.

11 This Court's April 2013 Order adopted a prudent approach whereby further extensions
12 "will be granted" if "substantial progress" has been made and will be "non-existent" if not. Smelt
13 Doc. No. 1106; Salmonid Doc. No. 739 (4/9/13 Order) at 15-16. That Order did not allow the
14 parties to impose additional requirements on CSAMP or how the agencies' remands must take
15 place. Indeed, the latter would be tantamount to a substantive revision of the existing remand
16 orders without noticed motions or any showing that such changes are warranted. Imposing the
17 requested conditions on CSAMP would improperly inject this litigation into that process, which
18 was formed to function independent of litigation, and which was sought as an *alternative* to
19 repeated interim relief proceedings before the Court. The April Order also did not contemplate
20 parties avoiding the collaborative approach at the heart of CSAMP by asking the Court—rather
21 than the Policy Group or the Collaborative Adaptive Management Team (CAMT), which include
22 representatives from Kern, the Coalition, the State Contractors, and Defendant-Intervenors—to
23 impose specific direction on how it will proceed.

24 As a practical matter, the proposed deadlines, when applied to the multiple and
25 interdependent workplan elements described in the CAMT Progress Report, Rea Decl. (Smelt
26 Doc. No. 1112; Salmonid Doc. No. 747) ¶ 3, Ex. A (Progress Report), would create an inflexible
27 and potentially unworkable scientific research process. Specifically, it would distract and disrupt
28 the detailed scientific research agenda set forth in the progress report for 2014. Movants

1 therefore re-affirm their request that this Court extend the remands for another year, without
 2 additional conditions.

3 **I. A Six-Month Extension Would Disrupt CAMT’s Planned Research Schedule.**

4 Movants recognize that the Ninth Circuit’s “anticipated opinion” in the *Consolidated*
 5 *Smelt Cases* may require them to return to the Court to request an adjustment of the remand
 6 schedules; however, that potential does not warrant six-month progress reports. Under such a
 7 scenario, Movants would be expected to continue devoting limited resources to CSAMP, but
 8 with the added burden of increased litigation filings. An even shorter extension and the
 9 uncertainty involved in obtaining additional extensions would also require Movants to
 10 simultaneously devote resources to preparing remand documents, contrary to the objective of the
 11 extension request. That is unworkable, and would not allow Federal Defendants to incorporate
 12 any work product of CSAMP in the consultation packages for the remands.

13 Nor is it necessary. The following table details the aggressive research agenda for the
 14 coming six months—outlined in the Progress Report—that will occupy CAMT’s time and
 15 resources.¹ See Jt. Status Rpt., Att. 1 (CAMT workplans), Smelt Doc. No. 1109-1, Salmon Doc.
 16 No. 745-1. A six-month extension, plus an additional progress report, would interfere with
 17 CAMT’s time and resources and its ability to achieve the agenda and research described below.

March 2014
<ul style="list-style-type: none"> • CAMT will convene a working session of the South Delta Salmonid Research Collaborative (SDSRC) to agree on a detailed description of an expanded scope of work for SDSRC that would include indirect ecological effects of the south Delta water operations and would build on the current SDSRC conceptual model. Progress Report, Table 3-3.8 at 28. • CAMT recommends that SDSRC be directed to periodically report research progress to CAMT. <i>Id.</i>, Table 3-3.5 at 26.
April 2014
<ul style="list-style-type: none"> • CAMT will convene a workshop to discuss problems arising from the present methods

26 ¹ CAMT includes representatives from the Bay Institute, Santa Clara Valley Water District, the
 27 U.S. Fish and Wildlife Service, the State and Federal Contractors Water Agency, the U.S.
 28 Bureau of Reclamation (Reclamation), the Delta Science Program, the National Marine Fisheries
 Service (NMFS), the DWR, the Interagency Ecological Program (IEP), the California
 Department of Fish and Wildlife, and the Nature Conservancy. Progress Report at ii.

1 used for monitoring Delta smelt. Progress Report, Table 3-1.1 at 13.

- 2 • CAMT will prepare a detailed workplan to identify what habitat conditions (e.g. first
- 3 flush, turbidity, water source, food, time of year) lead adult Delta smelt to enter and
- 4 occupy the central and southern Delta. *Id.*, Table 3-2.1 at 19.
- 5 • CAMT will prepare a detailed workplan to assess the magnitude of Delta smelt
- 6 entrainment at the project pumps that occurs during different years and environmental
- 7 conditions. *Id.*, Table 3-2.2 at 20.
- 8 • CAMT will receive a status update from SDSRC on efforts to synthesize published
- 9 reports and empirical data on water export effects on juvenile salmonid survival in the
- 10 Delta. *Id.*, Table 3-3.1 at 14.
- 11 • CAMT will receive a briefing from the NMFS Southwest Fisheries Science Center
- 12 (SWFSC) on the winter-run salmonid life cycle model. *Id.*, Table 3-3.2 at 25.
- 13 • SDSRC will prepare a revised proposal to synthesize data from existing salmon survival
- 14 studies to address questions about the direct and indirect effects of exports on salmonids.
- 15 *Id.*, Table 3-3.3 at 25.

11 **May 2014**

- 12 • CAMT will finalize the study plan to review monitoring methods for Delta smelt.
- 13 Progress Report, Table 3-1.1 at 13.

13 **June 2014**

- 14 • CAMT will collaborate with the Interagency Ecological Program in finalizing a study
- 15 addressing the gear efficiency of methods used to monitor Delta smelt. Progress Report,
- 16 Table 3-1.1 at 13.
- 17 • With the assistance of the IEP, CAMT will prepare a study plan on the effects of fall
- 18 outflow on Delta smelt. *Id.*, Table 3-1.3 at 14.
- 19 • CAMT will receive a second status update from SDSRC on efforts to synthesize
- 20 published reports and empirical data on water export effects on juvenile salmonid
- 21 survival in the Delta. *Id.*, Table 3-3.1 at 24.
- 22 • CAMT will convene a working group to synthesize and evaluate existing data to identify
- 23 and evaluate metrics other than the inflow/export ratio that can be used to manage South
- 24 Delta water operations with a progress report scheduled for November 2014. *Id.*, Table
- 25 3-3.4 at 26.

22 **July 2014**

- 23 • CAMT will convene a scoping group to evaluate available Delta smelt life cycle models
- 24 with the intention of issuing a study plan by December 2014. Progress Report, Table- 3-
- 25 1.2 at 14.

25 **August-September 2014**

- 26 • CAMT will receive a third status update from SDSRC on efforts to synthesize published
- 27 reports and empirical data on water export effects on juvenile salmonid survival in the
- 28 Delta. A draft report is scheduled for release in September 2014 and a final report for
- November 2014. Progress Report, Table 3-3.1 at 24.

September-November 2014

- CAMT will receive a third status update from SDSRC on efforts to synthesize published reports and empirical data on water export effects on juvenile salmonid survival in the Delta. A draft report is scheduled for release in September 2014 and a final report for November 2014. Progress Report, Table 3-3.1 at 24.

In short, a six-month, rather than full-year, extension would force CAMT to work on a litigation progress report, rather than the biologically useful scientific research described above. This litigation distraction would hamper CAMT's work and delay development of collaborative scientific studies relevant to the preparation of the remanded biological opinions (BiOps). As noted earlier, parties to the litigation, including water contractors and environmental groups, are represented in CSAMP and will have a full opportunity to monitor this scientific work.

II. The CAMT Workplan addresses many of the State Contractors' Concerns.

State Contractors expressed concerns about the timeliness of CSAMP efforts in four research areas: (i) development of life cycle models for the Delta Smelt and salmonids; (ii) turbidity models; (iii) fall outflow effects on the Delta smelt; and (iv) South Delta salmonid survival. But the CAMT workplan directly discusses CSAMP's work in these areas and plans for future research. *See* Jt. Status Rpt., Att. 1. First, life-cycle models are a high priority item for the agencies, and they are on a critical path for the remand schedule. Indeed, the CAMT Progress Report includes very aggressive schedules for life-cycle models. The CAMT South Delta Salmonid Survival Workplan, Table 3-3, Progress Report at 24-30, includes two elements related to life-cycle modeling. Work Element 3-3.2 provides that CAMT will be briefed on the SWFSC winter-run salmonid life cycle model by April 2014. *Id.*, Table 3-3.2 at 25. Pending the outcomes of workplan elements relating to further development of a conceptual model and data synthesis, Work Element 3-3.7 anticipates, pending acquisition of new resources, "conven[ing] a working group to evaluate the potential for existing models or new tools to inform the consultation on project operations." *Id.*, Table 3-3.7 at 27. The CAMT workplan also envisions creation of a scoping group to evaluate Delta Smelt life cycle models by July 2014 and the completion of a study plan by December 2014. *Id.*, Table 3-1.2 at 14. In short, the proposal to create yet another working group on life cycle modeling is duplicative and unnecessary. In any event, it is well

1 within the CSAMP Policy Group’s role to consider such a working group and there is no reason
2 for the Court to assume that responsibility.

3 Second, the suggestion that CAMT should be forced to finalize a new study plan by
4 August 1, 2014, for new turbidity research duplicates on-going work described in the CAMT
5 workplan. As noted above, the CAMT workplan **already** proposes that CAMT prepare a detailed
6 workplan to address “what habitat conditions (e.g. first flush, turbidity, water source, food, time
7 of year) lead to adult Delta Smelt entering and occupying the central and south Delta” by April
8 2014. *Id.*, Table 3-2.1 at 19. An additional workplan deadline would therefore serve no
9 functional purpose.

10 Third, the contention that CAMT has failed to take steps to address the effects of fall
11 outflow on Delta Smelt ignores CAMT’s attempts to work collaboratively with other, on-going
12 efforts to address this issue. As noted in Ms. Moon’s declaration, the collaborative IEP, in
13 conjunction with the U.S. Geological Survey and Reclamation, has been working on a report on
14 fall low salinity habitat for the Delta Smelt (FLaSH), which is expected to be finalized in 2014.
15 Moon Decl. at ¶ 3. The IEP’s Management, Analysis, and Synthesis Team (MAST) has been
16 working on similar issues. *Id.* at ¶ 8. The CAMT workplan anticipates building on the results of
17 the FLASH and MAST reports with the release of a draft report addressing the effects of fall
18 outflow on delta smelt by November 2014. Progress Report, Table 3-1.3 at 14.

19 Fourth, State Contractors’ concerns about the timeliness of SDSRC efforts are misplaced.
20 While CAMT works closely with the SDSRC, Movants note that the two entities are separate
21 groups. Still, the CAMT workplan proposes implementation of several study plans that build
22 upon the efforts of the SDSRC. Progress Report, Tables 3-3.1 at 24; 3-3.7 at 27; 3-3.8 at 28. This
23 CAMT process is not behind schedule. Kern’s related suggestion that the agencies have failed to
24 devote sufficient resources to CSAMP ignores the SDSRC progress to date and is otherwise
25 unfounded. While NMFS and the other agencies are committed to CSAMP and are committing
26 available resources to this effort, *see id.* at 12, the uncertainty associated with the year-by-year
27 extension has resulted in the need to allocate agency resources in a way that was not
28 contemplated when Movants filed the original three-year extension request. Yet, the agencies

1 have still dedicated extensive resources and made best efforts at pursuing all undertakings,
2 including CSAMP. FWS has expended more than 1,000 hours of staff time on CSAMP.
3 Lohofener Decl. ¶ 5.

4 NMFS likewise has devoted considerable resources, including extending Dr. Schiewe's
5 contract to work on SDSRC, which is fulfilling the purposes of the subgroup on south Delta
6 salmonid survival, Progress Report at 58; *id.* ¶¶ 6-8, and redirecting an additional staff member's
7 time besides the two already committed to the CAMT process. Contrary to the position
8 statements, a member of NMFS staff was present at all CAMT meetings, including the few
9 meetings that the schedule of NMFS Assistant Regional Administrator Maria Rea did not allow
10 her to personally attend. Kern also fails to note that CAMT explicitly decided to defer new
11 hypotheses to the SDSRC, which is an open group that contains public water agency technical
12 representatives. Rea Decl. at ¶ 10.

13 The "other related activities" section of the Status Report—including work by the
14 SDSRC—shows that important agency science processes that are relevant to subjects CSAMP
15 proposes to investigate are already underway and have benefitted from the Court's extension.
16 Ms. Rea explains that the SDSRC (or its technical working group) has been meeting since late
17 January 2013 and has developed a series of technical products. *Id.* ¶¶ 6-7. SDSRC—in which
18 NMFS is heavily engaged—is likely to extend beyond the remand process and CSAMP does not
19 supersede or replace them. At bottom, CSAMP will increase the level of stakeholder
20 involvement and cooperation in the development of new science. It was intended to attempt
21 voluntary collaboration that may, depending on its success, be injected into other, longer-
22 standing processes over time. But the agencies retain their discretion to evaluate, weigh, and use
23 all relevant sources of scientific information in accordance with its availability, relevance,
24 credibility and persuasiveness in preparation of the consultation package and BiOps.

25 **III. The Proposed Requirements For Development Of New BiOps Are Improper.**

26 State Contractors and Kern both ask the Court to require the agencies to wrap
27 development of the consultation package and BiOps into CSAMP, and to impose a host of
28 requirements on the agencies to "structure[] development of new BiOps." Jt. Status Rpt. at 16.

1 These include a requirement that “the parties” describe every six months how “the research,
2 modeling, and other work completed at that point will be incorporated into the reconsultation
3 process,” and provide “a schedule of action items and proposed milestone dates for the structured
4 development of new BiOps.” *Id.* State Contractors seek a requirement that FWS and NMFS
5 “collaborate with the other parties to the litigation to devise a structured approach for the
6 development of new BiOps, including an effects analysis that draws upon the best available
7 scientific information.” *Id.*

8 This is not what Movants contemplated when they requested time to undertake CSAMP.
9 Nor were such conditions contemplated by the April 2013 Order, which stated that if substantial
10 progress had been made, another extension “will be granted;” if not, it would be “non-existent.”
11 More fundamentally, imposing such conditions on the remands is contrary to basic principles of
12 administrative law, as they improperly constrain the agencies’ discretion on remand to determine
13 how they “may best proceed to develop the needed evidence and how [their] prior decision[s]
14 should be modified in light of such evidence as develops.” *Fed. Power Comm’n v. Transcon.
15 Gas Pipe Line Corp.*, 423 U.S. 326, 333-34 (1976). Indeed, the proposed requirements amount to
16 Court-ordered detailed injunctive relief, which “clearly runs the risk of ‘propel[ling] the court
17 into the domain which Congress has set aside exclusively for the administrative agency.’” *Vt.
18 Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 544-45 (1978); accord *INS v. Ventura*,
19 537 U.S. 12, 16 (2002) (court may not “intrude upon the domain which Congress has exclusively
20 entrusted to an administrative agency”). When a “court determines that the agency’s course of
21 inquiry was insufficient or inadequate, it should remand the matter to the agency for further
22 consideration and not compensate for the agency’s dereliction by undertaking its own inquiry
23 into the merits.” *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980). “[I]ntervention into
24 the process of environmental regulation, a process of great complexity, should be accomplished
25 with as little intrusiveness as feasible.” *W. Oil & Gas Ass’n v. EPA*, 633 F.2d 803, 813 (9th Cir.
26 1980). To that end, the Court remanded the BiOps without substantive conditions. The requested
27 requirements substantively change those orders, are inconsistent with CSAMP, and are contrary
28 to administrative law principles. They should be rejected.

1 **IV. The Parties' Requests Duplicate and Delay Work Proposed in the CAMT Workplan.**

2 State Contractors have proposed that the parties submit another joint status report in six
3 months on CSAMP's progress and have offered several "benchmarks" that they believe CAMT
4 should meet. Two of these "benchmarks" would duplicate efforts already proposed in the CAMT
5 workplan. First, State Contractors suggest that by August 1, 2014, CAMT should be required to
6 convene a multi-party working group drawn from the litigants or their designees to develop life
7 cycle models for delta smelt and salmonids and/or review and comment on models being
8 developed outside of CAMT. But, as noted above, the CAMT workplan already contains a
9 process to address life cycle model review and consideration. Progress Report, Tables 3-1.2 at
10 14; 3-3.2 at 25; 3-3.7 at 27. Second, State Contractors would have the Court order CAMT by
11 August 1, 2014 to finalize a study plan for new turbidity research. Again, the CAMT workplan
12 addresses this matter by scheduling CAMT to develop by April 2014 a detailed workplan that
13 will address turbidity issues. *Id.*, Progress Report, Table 3-2.1 at 19. The proposed two
14 "benchmarks" thus duplicates scientific work anticipated by the CAMT workplan. In a third
15 "benchmark" the state contractors have raised concerns that the projects did not properly prepare
16 an annual operations plan. But a 2014 plan was completed in January after a review by CAMT
17 members and was filed with the status report. Fujitani Decl. at ¶ 2.

18 **V. Conclusion**

19 In sum, CAMT, which includes representatives from the litigating parties, Progress
20 Report at ii, has invested considerable effort in developing the Progress Report and its workplan.
21 Six-month progress reports and benchmarks would harm this collaborative process and delay the
22 scientific research agenda described above. It will make these efforts slower and more
23 cumbersome and require a greater level of agency participation, which resources may not allow.
24 It also may not comport with administrative law regarding remand of agency decisions. If
25 imposed, these requirements will force the agencies to determine whether CSAMP is consistent
26 with law and agency priorities in an environment of declining resources. For the foregoing
27 reasons, this Court should extend the remands for another year, without additional conditions.

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1 Dated: February 28, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2014, I filed a true and correct copy of the foregoing document with the Court's CM/ECF system, which will generate a Notice of Filing to all attorneys of record, including the following:

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